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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR

THE NINTH CIRCUIT

Mrs. Glenn D. Hart and Glenn D. Hart,
Appellants,

vs.

Walter Adair, J. T. Epperly, James P. Burns, F. S. Green and L. B. Wallace,
Appellees,

AND

W. C. Harding Land Company, a corporation,
Appellant.

vs.

Mrs. Glenn D. Hart and Glenn D. Hart,
Appellees.

REPLY BRIEF OF APPELLANT W. C. HARDING LAND COMPANY.

On Appeal from the District Court of the United States for the District of Oregon.

O. P. COSHOW,
Attorney and Solicitor for W. C. Harding Land Company.

FROM THE PRESS OF THE EVENING NEWS, ROSEBURG, OREGON

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REPLY BRIEF.

The brief of the Appellees Hart discusses only the alleged failure of the Appellant W. C. Harding Land Company to make proper assignments of error, and appears to rest the case of Appellees upon said objection, without discussing the merits.

We do not think it necessary to discuss in detail the several authorities cited in said brief, but would call attention to the fact that the decree appealed from was framed in accordance with Equity Rule 71, which prohibits the reciting or stating in the decree of any prior proceeding and thus does away with the recitals and declaratory part of the old forms of decrees. There were no findings of fact, no recital of facts, and nothing appearing in the decision of the lower Court which would indicate its view of the different questions entering into the case as shown by the pleadings and evidence. Under these circumstances it would appear quite difficult to frame assignments of error which would not be vulnerable to the objections raised by counsel for the Appellees Hart. By way of illustration attention might be called to the assignments of error on behalf of said Appellees in their own appeal in this case against the Appellees Adair, et al. See Transcript of Record, pages 232-3. These assignments

are subject to the same objection as to their generality that is now made againt the assignments of this Appellant. The fact is, however, that owing to the nature of the decision of the lower Court it would be difficult to make the assignments more specific without involving in them an analysis of the the pleadings and evidence such as is properly set forth in the briefs.

Many of the cases cited by Appellees Hart in support of their objection to the assignments of error were actions in which there were findings of fact made in the trial Court. In other cases the defect in the assignments of error was attacked by motion to strike the same from the Transcript of Record, whereas in this case no objection has been made until the cause is before the Appellate Court on the merits. Many of the cases cited were actions at law, in which there was ample opportunity to specify the alleged errors of the Court, because the proceedings were so conducted that those errors could be pointed out. This creates a different situati from that in the present case, where we have nothing but the general conclusion of the Court. W would further call attention to the fact that in many of the cases cited in said brief, although the reviewing Court criticised the assignments of error, still it examined the entire Record before reaching a conclusion.

It is true that the answer of Appellees Adair, et al, expressly pleaded ratification and affirmance of the sales contracts. Much testimony on this question also was introduced. The answer of this Appellant expressly pleaded the offer made by Appellant to substitute pear trees for peach trees, after the failure of the latter had been ascertained. However, we take it that an express ratification on behalf of the purchasers was not necessary, but if it appears from their conduct that they at any time ratified the contracts there could be no recovery by them, even though ratification might not be pleaded as an affirmative defense. If it appeared as a defect in the case made by the plaintiff there could be no recovery.

"When a party, with knowledge of facts entitling him to rescission of a contract or conveyance, afterwards, without fraud or duress, ratifies the same, he has no claim to the relief of cancellation. An express ratification is not required in order thus to defeat his remedy; any acts of recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it, have the effect of an election to affirm. 'This doctrine seems to rest not upon the principle of a new contract between the parties, nor yet upon the ordinary principle of estoppel in pais, but rather upon a distinct principle of public policy, that all that justice or equity requires

for the relief of a party having such cause to impeach a contract is that he should have but one fair opportunity, after full knowledge of the rights, to decide whether he will affirm and take the benefits of the contract or disaffirm it and demand the consequent redress. Any other rule would be regarded as unjust, even toward the party guilty of the wrong out of which grows the right to rescind'."

6 Cyc. 297-8.

It is claimed that this Appellant cannot now rely upon the assignments of the contracts to the complainant, as affirmations thereof, or as constituting merely attempts to transfer litigious rights, for the alleged reason that no such defense was interposed in the Court below. In answer to this it is only necessary to call attention to the fact that the assignment of the contracts was pleaded by complainant and was proven by her on the trial. It was therefore not necessary or proper that this Appellant should plead the same, and if the assignments have the legal effect claimed by this Appellant, then the matter arises upon the consideration of the Bill of Complaint itself, and the question is one that stands at the very threshold of this case. Therefore this Appellant is not seeking to inject this question into the Record, as claimed. Appellees Hart in objection to the assignments of error as made by this Appellant rely upon rule 11 of this

Court, but that rule itself provides that the Court may, at its option, notice a plain error not assigned. It would be difficult to point out an error that could be plainer than to permit plaintiff to recover, in a suit for rescission, as assignee of other persons, where the assignments themselves are set out in the Bill, and either amount to affirmations of the contracts, and thus preclude rescission, or else amount to mere void attempts to assign litigious rights.

"The Court of review will, without mention of the same, in an assignment of errors, consider * * * an error that lies at the threshold of the case and shows that the plaintiff below had no cause of action." 3 Foster, Fed. Prac. 4th ed. p. 2081, sec. 508 a., citing A. Santaella & Co. v. Otto F. Lange Co. (C. C. A.) 155 Fed. 719, and U. S. v. Bernays (C. C. A.) 158 Fed. 792.

In the brief under discussion counsel expends considerable effort to show that the defense of estoppel must be pleaded. We do not take issue with him in that particular.

We are not conscious of having claimed anything to the contrary in our former brief. We have not asserted that plaintiff is estopped to seek a rescission of the assigned contracts. On the contrary we claim that the assignments of the contracts produced a certain legal effect in substance. Estop-

pel relates to matters of proof. The Bill of Complaint shows the assignments, and the point we raise has nothing to do with proof. We have desired that plaintiff might be heard, and she has been heard, and by the pleadings and proof offered by herself it conclusively appears that she has no cause of suit upon the two assigned claims. Surely one who pleads and proves sufficient to bar himself from any right of recovery is not suffering in any way from the application of the principle of estoppel. The point we raise in this connection was before the lower Court and is before this Court, because of the allegations of the Bill of Complaint itself. It cannot be said that a question which appears on the face of the Bill itself is "imported," into the case by the defendants.

We quote as follows from Santaella & Co. v. Otto F. Lange Co., decided by the Circuit Court of Appeals of the 8th Circuit, 155 Fed. 719 at 724:

"That counsel does not fully recognize and urge a principle of law in argument which is embraced within the pleadings or presented in the Record cannot preclude the Court from giving due consideration and application to a rule of law which is determinative of the controversy. Indeed, an appellate Court would fail to heed the wholesome maxim, **'Interest reipublicae ut sit finis litium,'** should it fail to take notice, when reasonably pre-

sented, of a settled principle of law the application of which ends the litigation. Rule 11 of this Court (150 Fed. XXVII) respecting the assignment of errors, declares that 'the court, at its option, may notice plain errors not assigned.' This proviso was and is intended, in the interest of justice, to reserve to the appellate court the right, resting in public duty to take cognizance of palpable error on the face of the record and proceedings, especially such as clearly demonstrate that the suitor has no cause of action."

As to Jurisdiction.

It appearing that Plaintiff cannot recover upon the assigned contracts, the amount involved is reduced to less than two thousand dollars and the Bill should be dismissed for lack of jurisdiction, there being no federal question in the case.

Farmington v. Pillsbury, 114 U. S. 143, 29 L. ed. 114.

The Court should dismiss the suit of its own motion. The Supreme Court of the United States said in Morris v. Gilmer, 129 U. S. 315, 326, 32 L. ed. 690:

"But if the record discloses a controversy of which the court cannot properly take cognizance, its duty is to proceed no further and to dismiss the suit; and its failure or refusal to do what, under the law

applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct, when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382 (28:462, 463) 'which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other Courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for himself, even when not otherwise suggested, and without respect to the relations of the parties to it.' To the same effect are King Bridge Co. vs. Otoe Co. 120 U. S. 225 (30:623); Grace v. Am. Cent. Ins. Co. 109 U. S. 278, 283 (27:932, 934); Blacklock v. Small, 127 U. S. 96, 105 (ante. 70) and other cases."

See also the later cases. Minnesota v. Northern Securities Co. 194 U. S. 48, 62; 48 L. ed. 870; Steigleder v. McQuesten 198 U. S. 141, 142, 49 L. ed. 986.

Respectfully submitted,

O. P. COSHOW,

Attorney and Solicitor for Appellant W. C. Harding Land Co.

CERTIFICATE.

I, ...

Solicitor for ....

....

hereby certify that the foregoing is a true and correct copy of the brief on behalf of said .....

....

and of the whole thereof in the within entitled cause.

....

Solicitor for ....

....

ACKNOWLEDGMENT OF SERVICE.

STATE OF OREGON,
COUNTY OF _____ } ss.

I hereby acknowledge service of the brief of

....

in the within entitled cause on me in ....

....County, Oregon, this .....

day of April, 1916, by receipt personally of a duly certified copy thereof.

....

Solicitor for ....

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